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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13

14 ARTHUR LEE ALFRED, II et al.,

15 Plaintiffs,

16 v.

17 WALT DISNEY PICTURES,

18 Defendant,  
19

Case No. 2:18-CV-08074-CBM-ASx

**DISCOVERY MOTION**

**JOINT STIPULATION  
REGARDING DEFENDANT'S  
MOTION TO COMPEL  
RESPONSES TO CONTENTION  
INTERROGATORIES**

Judge: Hon. Alka Sagar

Hearing Date: April 26, 2022

Time: 10:00 a.m.

Place: Roybal Ctrm. 540

Pretrial Conf.: January 9, 2023

Trial Date: February 7, 2023

Discovery Cutoff: June 27, 2022

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1 This Joint Stipulation is submitted by the undersigned parties pursuant to  
 2 Local Rule 37-2 in connection with Defendant Walt Disney Pictures' ("WDP")  
 3 motion to compel Plaintiffs Arthur Lee Alfred II and Ezequiel Martinez, Jr. to  
 4 respond to interrogatories. In accordance with Local Rule 37-1, the parties have met  
 5 and conferred in good faith to resolve this dispute but were unable to do so.

# 6 **I. WDP'S INTRODUCTORY STATEMENT**

7 This is a copyright infringement case in which Plaintiffs allege that WDP's  
 8 2003 motion picture *Pirates of the Caribbean: The Curse of the Black Pearl*  
 9 ("*Curse*") infringes their Screenplay, which—like WDP's motion picture—adapted  
 10 Disney's Pirates of the Caribbean theme park ride. It will be Plaintiffs' burden at  
 11 trial to identify and prove which original elements of their Screenplay WDP  
 12 infringed.

13 That is precisely the information that WDP seeks with four contention  
 14 interrogatories that Plaintiffs refuse to answer. These interrogatories seek essential  
 15 facts about Plaintiffs' contentions: Interrogatories 4 and 6 ask Plaintiffs to identify  
 16 the elements of their Screenplay that WPD allegedly infringed and the elements of  
 17 *Curse* that are allegedly infringing; Interrogatory 5 asks Plaintiffs to state all facts  
 18 supporting their contention that each of the allegedly infringed elements in the  
 19 Screenplay constitute original expression that is protectable by copyright; and  
 20 Interrogatory 8 asks Plaintiffs to state all facts that support their contention that  
 21 WDP copied their Screenplay.

22 Plaintiffs' primary objection is that these interrogatories are precluded by an  
 23 earlier Court order bifurcating discovery pursuant to a stipulation of the parties.  
 24 That order bifurcated early *expert* discovery on substantial similarity to facilitate the  
 25 efficient disposition of early summary judgment motions, and importantly provided  
 26 that discovery on "all issues" would open if the case proceeded beyond summary  
 27 judgment. Declaration of Jordan D. Segall ("Segall Decl.") Ex. 4 [Dkt. 122] ¶ 7.  
 28 Indeed, WDP *could not* have served the interrogatories at issue in discovery phase 1:

1 the Court’s bifurcation order specifically limited to discovery to initial disclosures,  
2 an exchange of expert reports on substantial similarity, and “one deposition of each  
3 side’s respective expert witnesses on substantial similarity.” *Id.* ¶ 5. The parties did  
4 not forfeit the opportunity to take *non-expert* discovery on substantial similarity. In  
5 any event, even if Plaintiffs’ interpretation of the discovery stipulation were viable,  
6 the interrogatories at issue are relevant to issues other than substantial similarity,  
7 such as independent creation and the Screenplay’s status as a derivative work of  
8 Disney’s intellectual property (namely, the theme park attraction). Even Plaintiffs  
9 concede these issues are appropriate topics for discovery at this stage.

10 Indeed, it is well-established that contention interrogatories are “generally  
11 proper” and serve the important purpose of narrowing the issues for trial.  
12 *Stamps.Com, Inc. v. Endicia, Inc.*, 2009 WL 2576371, at \*2 (C.D. Cal. May 21,  
13 2009). District courts in the Ninth Circuit have repeatedly compelled plaintiffs to  
14 answer contention interrogatories, in part because defendants “should not have to  
15 guess” about plaintiffs’ legal contentions or the facts supporting them. *Tennison v.*  
16 *City & Cnty. of San Francisco*, 226 F.R.D. 615, 618 (N.D. Cal. 2005).

17 WDP is particularly entitled to full and complete answers to these particular  
18 interrogatories because, in the five years they have been litigating this case,  
19 Plaintiffs’ account of what elements of their Screenplay were allegedly appropriated  
20 has been all over the map. In their original complaint, Plaintiffs alleged that the  
21 “Captain Jack Sparrow” character in *Curse* was substantially similar to the “Captain  
22 Davy Jones” character in their Screenplay because both are “depicted as having a  
23 sense of humor.” *See* Segall Decl. Ex. 5 [Compl., Dkt. 1] ¶ 13. The First Amended  
24 Complaint, by contrast, alleges that both works are similar because they depict  
25 “morally ambiguous” pirates with “significant alcohol problem[s].” *See id.* Ex. 6  
26 [FAC, Dkt. 112] ¶¶ 84–85. Plaintiffs then submitted an expert report from a  
27 comparative literature professor who identified a number of purported similarities  
28 that were not described in any pleading, including that both works feature “strong

1 female heroine[s]” and “pirate ships with skeleton crews”; “share a common theme  
2 of mentorship of male orphans”; and both “begin[] with a prologue.” *Id.* Ex. 7  
3 [Román Report, Dkt. 112-6] at 10, 11, 12, 13.

4 With the close of fact discovery now just three short months away, these  
5 moving-target litigation tactics must come to an end. To adequately prepare for  
6 trial, WDP needs a definitive statement of the contentions that Plaintiffs intend to  
7 make at trial regarding the specific elements of their Screenplay that they allege  
8 WDP copied in making *Curse*. This information is crucial for WDP’s trial  
9 preparation so that it can respond with evidence (1) that Plaintiffs appropriated the  
10 allegedly similar elements from Disney’s theme park ride; (2) that the purportedly  
11 similar elements between *Curse* and the Screenplay are significantly different at the  
12 level of concrete expression; (3) that purportedly similar elements are generic to the  
13 pirate genre and are therefore not protectable in copyright; and (4) that the evidence  
14 shows that the allegedly similar elements were independently created by *Curse*  
15 writers who had no access to Plaintiffs’ Screenplay.

16 WDP cannot assert these defenses effectively if it cannot pin Plaintiffs down  
17 on which elements of their Screenplay were allegedly copied by WDP and  
18 incorporated into *Curse*. And there is no question that now is the appropriate time  
19 for Plaintiffs to articulate such contentions. Plaintiffs submitted their Screenplay to  
20 WDP in 2000, and *Curse* was released in 2003. They have had nearly *twenty years*  
21 to evaluate the alleged similarities between *Curse* and their work. With expert  
22 discovery on substantial similarity complete and the close of discovery ending soon,  
23 there is no conceivable basis for Plaintiffs’ continued stonewalling.

24 The Court should compel Plaintiffs to provide complete answers to WDP’s  
25 Interrogatories 4, 5, 6, and 8.

26 ///

27 ///

28 ///

## II. PLAINTIFF SCREENWRITERS' INTRODUCTORY STATEMENT

The parties' dispute over substantial similarity is ready for trial. Several years ago, the Ninth Circuit rejected Disney's arguments that the Plaintiff Screenwriters' *Pirates* screenplay is not substantially similar to Disney's *Pirates* film as a matter of law. The parties have completed discovery on the subject, including through dueling experts who disagree over the substantial similarity between the two works. And Judge Marshall has denied Disney's motion for summary judgment on that same issue as well, along with Disney's motion to certify that denial to the Ninth Circuit.

The parties envisioned this posture when they bifurcated fact discovery into two phases. On remand from the Ninth Circuit, the parties streamlined fact and expert discovery on substantial similarity in Phase 1, so that Disney could enjoy the benefit of an early summary judgment motion. While Disney enjoyed that benefit, it now seeks to backtrack on that stipulation because it does not like the result from Judge Marshall. Consider Disney's position now that Plaintiff Screenwriters are "wrong" that "[t]he purpose of the stipulation was that substantial similarity would be *resolved* in Phase 1." Disney Points and Contentions, §IV.B. Yet Disney's counsel represented the exact opposite when it negotiated and induced the original stipulation on bifurcation: "As we agreed during the call, the purpose of bifurcating discovery is so that substantial similarity can be *resolved* before proceeding to discovery [on] *other* issues." Hilvert Decl. ¶8 Ex. D (emphasis added). Disney's efforts to relitigate substantial similarity in Phase 2 discovery does not honor the purpose or the plain language of the parties' agreement or corresponding order.

The plain language of Disney's four overlapping and burdensome contention interrogatories addresses substantial similarity, not any affirmative defense. Indeed, these interrogatories are about elements in the film that are "copied," "infringed," and "original"— topics that underlie a substantial similarity analysis and which the parties litigated in Phase 1. Nor has Disney justified why it would need four separate

1 “all facts” contention interrogatories on the same subject under any scenario. The  
 2 Court should deny Disney’s motion.

### 3 **III. INTERROGATORIES IN DISPUTE**

#### 4 **INTERROGATORY NO. 4:**

5 Identify and describe with particularity each element of YOUR  
 6 SCREENPLAY that you contend DEFENDANT infringed.

#### 7 **ANSWER TO INTERROGATORY NO. 4:**

8 Plaintiffs object to this Interrogatory as seeking discovery on questions of  
 9 substantial similarity in violation of the parties’ stipulation, which provides that  
 10 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this  
 11 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best  
 12 expedite the litigation. That agreement was predicated on a shared interest “in  
 13 streamlining this action by reducing the number of named defendants and  
 14 establishing certain mutually-agreeable timeframes regarding discovery, motion  
 15 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach  
 16 to discovery, under which fact discovery would be bifurcated into two phases.  
 17 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”  
 18 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and  
 19 depositions. Disney then filed its summary judgment motion, which the Court  
 20 denied.

21 After the Court’s denial of summary judgment, this case moved into the  
 22 “second phase” of discovery. That “second phase” encompasses “other discovery”  
 23 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s  
 24 adoption of the parties’ stipulation, this “second phase” is limited to issues *other*  
 25 than substantial similarity.

26 On the basis of their objection, Plaintiffs will not respond to this  
 27 Interrogatory.



1           **INTERROGATORY NO. 5:**

2           Identify all facts that support or refute YOUR contention that each component  
3 identified in response to Interrogatory 4 above contains original expression that is  
4 subject to protection under copyright law.

5           **ANSWER TO INTERROGATORY NO. 5:**

6           Plaintiffs object to this Interrogatory as seeking discovery on questions of  
7 substantial similarity in violation of the parties’ stipulation, which provides that  
8 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this  
9 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best  
10 expedite the litigation. That agreement was predicated on a shared interest “in  
11 streamlining this action by reducing the number of named defendants and  
12 establishing certain mutually-agreeable timeframes regarding discovery, motion  
13 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach  
14 to discovery, under which fact discovery would be bifurcated into two phases.  
15 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”  
16 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and  
17 depositions. Disney then filed its summary judgment motion, which the Court  
18 denied.

19           After the Court’s denial of summary judgment, this case moved into the  
20 “second phase” of discovery. That “second phase” encompasses “other discovery”  
21 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s  
22 adoption of the parties’ stipulation, this “second phase” is limited to issues *other*  
23 than substantial similarity.

24           Plaintiffs further object to the requirement to provide “all facts” as overbroad  
25 and unduly burdensome. *See Philips N. Am. LLC v. PKI Healthcare, Inc.*, No.  
26 SACV 19-01765-JVS (JDEx), 2020 WL 3031614, at \*2-3 (C.D. Cal. Mar. 10, 2020)  
27 (collecting cases and noting that interrogatories demanding “all details, facts, and  
28 information . . . [are] facially overbroad, unduly burdensome, and disproportionate



1 to the needs of the case.”). Plaintiffs further object to the interrogatory to the extent  
 2 as not proportional to the needs of case as it calls for a legal conclusion on  
 3 individual components and is inconsistent with the Ninth Circuit’s direction to apply  
 4 the original selection and arrangement of elements.

5 On the basis of their objections, Plaintiffs will not respond to this  
 6 Interrogatory.

7 **INTERROGATORY NO. 6:**

8 Identify and describe with particularity each element of CURSE or any of the  
 9 SEQUEL MOVIES that YOU contend infringed YOUR copyright in THE  
 10 SCREENPLAY.

11 **ANSWER TO INTERROGATORY NO. 6:**

12 Plaintiffs object to this Interrogatory as seeking information not relevant to  
 13 any party’s claims or defenses in that it requests information how “any of the  
 14 SEQUEL MOVIES” infringe Plaintiffs’ Screenplay, which is not a claim asserted in  
 15 the First Amended Complaint (and as explained at the summary judgment hearing).  
 16 (For the avoidance of doubt, and as explained, Disney’s profits from the Sequels are  
 17 relevant to an award of damages for Disney’s infringement of the Pirates  
 18 Screenplay.)

19 Plaintiffs object to this Interrogatory as seeking discovery on questions of  
 20 substantial similarity in violation of the parties’ stipulation, which provides that  
 21 discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this  
 22 case, the parties stipulated to phased discovery—at Disney’s suggestion—to best  
 23 expedite the litigation. That agreement was predicated on a shared interest “in  
 24 streamlining this action by reducing the number of named defendants and  
 25 establishing certain mutually-agreeable timeframes regarding discovery, motion  
 26 practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach  
 27 to discovery, under which fact discovery would be bifurcated into two phases.  
 28 “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.”

1 *Id.* ¶ 10. The Parties completed that phase, including through expert reports and  
 2 depositions. Disney then filed its summary judgment motion, which the Court  
 3 denied.

4 After the Court’s denial of summary judgment, this case moved into the  
 5 “second phase” of discovery. That “second phase” encompasses “other discovery”  
 6 *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s  
 7 adoption of the parties’ stipulation, this “second phase” is limited to issues *other*  
 8 than substantial similarity.

9 On the basis of their objection, Plaintiffs will not respond to this  
 10 Interrogatory.

11 **INTERROGATORY NO. 8:**

12 Identify all facts that support YOUR contention that DISNEY copied YOUR  
 13 SCREENPLAY in the conception, creation, development, or production of CURSE  
 14 or any of the SEQUEL MOVIES.

15 **ANSWER TO INTERROGATORY NO. 8:**

16 Plaintiffs object to this Interrogatory as overbroad and unduly burdensome in  
 17 that it requests identification of “all facts.” *See Philips N. Am. LLC v. PKI*  
 18 *Healthcare, Inc.*, 2020 WL 3031614, at \*2-3 (C.D. Cal. Mar. 10, 2020) (collecting  
 19 cases and noting that interrogatories demanding “all details, facts, and information .  
 20 . . [are] facially overbroad, unduly burdensome, and disproportionate to the needs of  
 21 the case.”). Plaintiffs object to this Interrogatory as seeking information not relevant  
 22 to any party’s claims or defenses in that it requests information how “any of the  
 23 SEQUEL MOVIES” infringe Plaintiffs’ Screenplay, which is not a claim asserted in  
 24 the First Amended Complaint (and as explained at the summary judgment hearing).  
 25 (For the avoidance of doubt, and as explained, Disney’s profits from the Sequels are  
 26 relevant to an award of damages for Disney’s infringement of the Pirates movie.)  
 27 Plaintiffs further object to this Interrogatory as seeking discovery on questions of  
 28 substantial similarity in violation of the parties’ stipulation, which provides that

discovery is bifurcated. *See* Dkt. No. 121. After the Ninth Circuit remanded this case, the parties stipulated to phased discovery—at Disney’s suggestion—to best expedite the litigation. That agreement was predicated on a shared interest “in streamlining this action by reducing the number of named defendants and establishing certain mutually-agreeable timeframes regarding discovery, motion practice, and ADR.” *Id.* ¶ 1. To that end, the parties agreed to a “phased” approach to discovery, under which fact discovery would be bifurcated into two phases. “[D]iscovery in the first phase [was] limited to the issue of substantial similarity.” *Id.* ¶ 10. The Parties completed that phase, including through expert reports and depositions. Disney then filed its summary judgment motion, which the Court denied.

After the Court’s denial of summary judgment, this case moved into the “second phase” of discovery. That “second phase” encompasses “other discovery” *not relating to* substantial similarity. *See id.* ¶ 10(a). Thus, pursuant to the Court’s adoption of the parties’ stipulation, this “second phase” is limited to issues other than substantial similarity.

On the basis of their objections, Plaintiffs will not respond to this Interrogatory.

#### IV. WDP’S CONTENTIONS AND POINTS AND AUTHORITIES

##### A. WPD Served Targeted Contention Interrogatories That Are Proper And Necessary To Narrow The Issues Remaining For Trial

Contention interrogatories, which request that a party state its legal contentions or the facts supporting those contentions, are “generally proper.” *Stamps.Com*, 2009 WL 2576371, at \*2 (compelling responses to contention interrogatories in a patent infringement case that sought infringement and invalidity arguments for each of plaintiff’s patent claims).<sup>1</sup> Such interrogatories serve as “a

<sup>1</sup> Contention interrogatories are such a well-established discovery mechanism that disputes over contention interrogatories typically involve, not *whether* they are

1 useful tool to narrow the issues in dispute.” *Protective Optics, Inc. v. Panoptx, Inc.*,  
 2 2007 WL 963972, at \*2 (N.D. Cal. Mar. 30, 2007) (compelling responses to a  
 3 contention interrogatory seeking identification of claim limitations allegedly  
 4 practiced by the accused product). “Answers to contention interrogatories also serve  
 5 to narrow and sharpen the issues thereby confining discovery and simplifying trial  
 6 preparation.” *Asia Vital Components Co. v. Asetek Danmark A/S*, 377 F. Supp. 3d  
 7 990, 1003 (N.D. Cal. 2019) (quoting *Woods v. DeAngelo Marine Exhaust, Inc.*, 692  
 8 F.3d 1272, 1280 (Fed. Cir. 2012)).

9 WDP served four targeted contention interrogatories on Plaintiffs:

- 10 • **Interrogatory 4** asks Plaintiffs to identify every element of the Screenplay  
 11 that WDP allegedly infringed.
- 12 • **Interrogatory 5** asks Plaintiffs to state all facts supporting the contention that  
 13 the elements identified in Interrogatory 4 constitute original expression that is  
 14 subject to protection under copyright law.<sup>2</sup>

15  
 16 proper, but *when* they are proper, i.e., whether they are premature and should be  
 17 deferred until discovery is complete or a pretrial conference is held. *See* Fed. R.  
 18 Civ. P. 33(a)(2). Plaintiffs do not object on the basis that WDP’s requests are  
 19 premature and have therefore waived any such argument. *O. L. v. City of El Monte*,  
 20 2021 WL 926105, at \*3 (C.D. Cal. Jan. 11, 2021) (citing cases finding failure to  
 21 raise objection in responding to interrogatories waives it). In any event, WDP’s  
 requests are not premature. *See, e.g., In re Northrop Grumman Corp. ERISA Litig.*,  
 2010 WL 11468588, at \*3 (C.D. Cal. May 17, 2010) (contention interrogatories  
 appropriate where claims had been pending, plaintiff had time to review defendant’s  
 document production, and discovery would close in three months).

22 <sup>2</sup> Copyright only protects concrete expression, not general plot ideas, generic  
 23 elements, genre tropes, or *scenes-a-faire*. *Funky Films, Inc. v. Time Warner Ent.*  
 24 *Co.*, 462 F.3d 1072, 1081 (9th Cir. 2006). In opposing summary judgment,  
 25 Plaintiffs relied on the “selection and arrangement” doctrine, which holds, in certain  
 26 narrow circumstances, that a novel selection and arrangement of generic elements  
 27 can itself constitute protectable expression. *Metcalfe v. Bochco*, 294 F.3d 1069, 1074  
 28 (9th Cir. 2002). Interrogatory 5 is intended to help WDP distinguish between the  
 common elements that Plaintiffs contend are non-generic protectable expression and  
 the common elements that Plaintiffs contend are unprotectable in themselves but  
 subject to the selection-and-arrangement doctrine.

- 1 • **Interrogatory 6** asks Plaintiffs to identify every element of *Curse* or its
- 2 sequels that allegedly infringes the Screenplay.<sup>3</sup>
- 3 • **Interrogatory 8** asks Plaintiffs to state all facts that support their contention
- 4 that WDP copied the Screenplay.

5 These interrogatories are straightforward: Plaintiffs should be compelled to state the  
6 elements of their Screenplay that they claim WDP infringed and all facts in support  
7 so the parties know the issues in dispute as they prepare for trial.

8 The alleged similarities between Plaintiffs' work and WDP's will be a  
9 paramount issue at trial, and Plaintiffs' contentions on that issue should not be a  
10 guessing game. *See, e.g., Tennison*, 226 F.R.D. at 618 (granting motion to compel  
11 responses to contention interrogatories because defendant "should not have to  
12 guess" at facts underpinning plaintiff's claims). Plaintiffs will have the burden at  
13 trial to identify for the jury the elements of their Screenplay that they allege WDP  
14 both copied and unlawfully appropriated—as well as the facts that support their  
15 claim of copyright infringement. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111,  
16 1117 (9th Cir. 2018) (plaintiff must prove "substantial similarity" which includes  
17 "both the degree of similarity relevant to proof of copying and the degree of  
18 similarity necessary to establish unlawful appropriation"). WDP has a right to know  
19 what Plaintiffs contend so it can prepare its defenses.<sup>4</sup> Such contention

20 \_\_\_\_\_  
21 <sup>3</sup> Plaintiffs have stated in meet-and-confer calls that they are *not* contending that the  
22 *Curse* sequels infringe their Screenplay, but have so far refused to commit to that  
23 position in verified interrogatory responses. One further reason why WDP seeks an  
24 answer to Interrogatory 6 is to obtain a definitive answer on Plaintiffs' infringement  
25 contentions regarding the sequels.

26 <sup>4</sup> On summary judgment the Court held that competing expert opinions precluded a  
27 finding that Plaintiffs' Screenplay is not substantially similar to *Curse* as a matter of  
28 law, and the unresolved question of substantial similarity will be decided by the jury  
at trial. And even once the jury decides that issue, WDP could move for judgment  
as a matter of law on the substantial similarity issue. *See Gray v. Hudson*, \_\_ F.4th  
\_\_, 2022 WL 711246, at \*10 (9th Cir. Mar. 10, 2022) ("A trial judge has had the  
benefit of hearing testimony and a full presentation of the evidence when ruling on a

interrogatories “will advance the litigation as it will pin down [Plaintiffs’] position as the parties prepare for trial.” *Tennison*, 226 F.R.D. at 618.

Courts addressing similar contention interrogatories in the context of infringement allegations have compelled responses precisely so the defendant is not left guessing at trial:

At trial [plaintiff] is going to have to identify the allegedly infringing software and explain why it is infringing—it will need to say *something* about those issues simply as part of putting on its case.... Whatever [plaintiff’s] copyright case is at this point, it needs to disclose it to [defendant]. At this late date, [defendant] should not be in the position of having to guess what [plaintiff’s] theories will be at trial concerning what the allegedly infringing software is and how it is similar to [plaintiff’s] software.

*AutoOpt Networks, Inc. v. Karani*, 2018 WL 4558270, at \*2 (N.D. Cal. Sept. 20, 2018) (compelling a response to a contention interrogatory requiring identification of all similarities in a copyright case where plaintiff had sufficient discovery to answer the interrogatory in order to give defendant notice of plaintiff’s theories for trial).

The reasoning in *AutoOpt Networks* is on point. The plaintiff in that case had “some information with which to answer the interrogatory,” including, most importantly, copies of the software programs. 2018 WL 4558270, at \*1. The court held that plaintiff could not continue to refuse to answer the interrogatory because “it [wasn’t] waiting for anything.” *Id.* at \*2. That case was at the close of fact and expert discovery, but certain depositions remained. *Id.* (“fact and expert discovery closed ... except for specified depositions”).

Here, the key evidence relevant to Plaintiffs’ infringement contentions—the contents of Plaintiffs’ Screenplay and WDP’s *Curse* motion picture—has been

post-trial JMOL motion, which may occasionally give her new insights into the legal sufficiency of the evidence. While JMOL and summary judgment are procedurally similar, there is no rule preventing a trial judge from reconsidering her views on a case’s merits.” (citation omitted)).



known to Plaintiffs for literally decades. Plaintiffs filed this lawsuit in 2017, fourteen years after the alleged infringement. Both before and after filing suit, Plaintiffs and their attorneys have had ample time to determine what elements they intended to claim were infringed. Further, WDP has completed its production of substantially all relevant documents and the parties have exchanged substantial similarity expert reports and conducted expert depositions of those witnesses. Segall Decl. ¶¶ 10, 20. By the time this motion is heard, Plaintiffs will have taken several key depositions, including of executives and writers of *Curse*. *Id.* ¶ 15. In fact, Plaintiffs have compiled various (and often contradictory) lists of alleged similarities at different points during this litigation, including in their original Complaint, First Amended Complaint, motion to dismiss briefing, appellate briefs to the Ninth Circuit, summary judgment briefing, and their substantial similarity expert's reports. *Compare, e.g., id.* Ex. 5 ¶¶ 8–13 (substantial similarity contentions in original Complaint), *with id.* Ex. 6 ¶¶ 79–118 (substantial similarity contentions in FAC), *and id.* Ex. 7 (substantial similarity contentions in expert report of David Román). As was true of the defendant in *AutoOpt Networks*, WDP is simply asking for Plaintiffs' final contentions now that fact discovery is nearly complete: whatever Plaintiff believes to be the similar elements between the Screenplay and *Curse*, it must disclose them so WDP is not guessing at Plaintiffs' theories as it deposes Plaintiffs and prepares for trial. *AutoOpt Networks*, 2018 WL 4558270, at \*2.

The equities and judicial economy also favor compelling Plaintiffs to respond to WDP's contention interrogatories. WDP will be prejudiced if it does not have a complete list of the elements that Plaintiffs contend were infringed. WDP cannot readily prepare its defenses if it cannot pinpoint what expression Plaintiffs claim was infringed. Likewise, judicial economy is disserved if WDP must guess at Plaintiffs' alleged similarities from the various contradictory pleadings and filings Plaintiffs have prepared in five years of litigation—the trial will take longer and



1 WDP will expend substantial resources preparing unnecessary defensive evidence,  
 2 experts, and witnesses to address possible similarities that Plaintiffs do not intend to  
 3 assert at trial. *Cf. Asia Vital Components*, 377 F. Supp. 3d at 1004 (patent rules  
 4 were “designed to require parties to crystallize their theories of the case early in the  
 5 litigation and to adhere to those theories once they have been disclosed” (citations  
 6 omitted)).

7 Plaintiffs suffer no hardship, burden, or prejudice in answering WDP’s  
 8 interrogatories. As noted above, Plaintiffs have *already* compiled various lists of  
 9 alleged similarities and presumably believe they have evidence to support at least  
 10 some of those claims. *Tennison*, 226 F.R.D. at 618 (“At this juncture, discovery is  
 11 nearly complete, and hence Plaintiff is in a position to provide meaningful  
 12 answers.”). Plaintiffs’ reason for not responding is purely tactical.<sup>5</sup> They have  
 13 benefitted thus far from ambiguously framing the alleged similarities at the most  
 14 general level and then making statements like “Professor Román’s opinion detailed  
 15 *scores more similarities across all factors in the extrinsic test.*” Segall Decl. Ex. 10  
 16 [Dkt. 206] at 6 (emphasis added).

17 Plaintiffs surely believe they are strategically well-served by refusing to be  
 18 pinned down on their contentions about the similarities between the works—  
 19 particularly where, as here, the works have few concrete elements in common and  
 20 most of Plaintiffs’ purported “similarities” are familiar adventure-movie tropes like  
 21 humor, romance, and a Caribbean setting. But Plaintiffs’ obstruction does not serve  
 22 the aims of a “just, speedy, and inexpensive determination” of this action as required  
 23

---

24 <sup>5</sup> To the extent Plaintiffs claim they are still developing their theory, that is not a  
 25 reason to deny this motion. Plaintiffs are not foreclosed from amending their  
 26 interrogatories under appropriate circumstances: “[b]ecause ‘answers to contention  
 27 interrogatories evolve over time as theories of liability and defense begin to take  
 28 shape .... Rule 26(e) requires that as theories mature and as the relevance of various  
 items of evidence changes, responses to interrogatories, and particularly contention  
 interrogatories, be corrected or supplemented to reflect those changes.’” *Asia Vital  
 Components*, 377 F. Supp. 3d at 1003–04 (citing *Woods*, 692 F.3d at 1280).

1 by Rule 1 of the Federal Rules of Civil Procedure. Courts regularly compel  
 2 responses to contention interrogatories where, as here, WDP is “entitled to know the  
 3 basis of, and information regarding plaintiffs’ contentions on the matters that are the  
 4 subjects of the contention Interrogatories in Issue while discovery is ongoing so that  
 5 they may appropriately focus and conduct any further discovery in a timely  
 6 fashion.” *Williams v. City of Long Beach*, 2019 WL 11318323, at \*5 (C.D. Cal.  
 7 May 30, 2019) (compelling responses to contention interrogatories demanding all  
 8 facts supporting certain claims); *see also Mosaic Brands, Inc v. Ridge Wallet LLC*,  
 9 2020 WL 12048883, at \*7 (C.D. Cal. Nov. 2, 2020) (compelling a response to a  
 10 contention interrogatory seeking for plaintiff to identify all facts supporting claimed  
 11 equivalencies and all instances of alleged infringement).

12 **B. Plaintiffs’ Claim That The Parties’ Prior Discovery Stipulation**  
 13 **Prohibits Fact Discovery on Substantial Similarity Is Frivolous**

14 Plaintiffs’ principal objection to answering the contention interrogatories at  
 15 issue is that “discovery on questions of substantial similarity” is “in violation of” the  
 16 parties’ prior agreement to bifurcate discovery. This objection is flatly inconsistent  
 17 with the plain meaning of that stipulation.

18 The record reflects that the parties agreed to bifurcate discovery not to  
 19 confine fact discovery on substantial similarity to a first phase, but rather to  
 20 facilitate the district court’s efficient resolution of an early dispositive motion. By  
 21 way of background, courts in the Ninth Circuit routinely grant judgment for  
 22 defendants in copyright cases at the motion to dismiss or summary judgment stage  
 23 on the ground that the works at issue are not substantially similar as a matter of law.  
 24 *See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d  
 25 1157, 1164 (9th Cir. 1977) (substantial similarity “may often be decided as a matter  
 26 of law”). The district court here granted WDP’s motion to dismiss Plaintiffs’  
 27 complaint on precisely that ground. *See Segall Decl. Ex. 8 [Dkt. 93]* (dismissing  
 28 complaint without leave to amend). The Ninth Circuit reversed, holding that expert

1 testimony could help inform the question of substantial similarity, particularly by  
 2 distinguishing “unprotected generic, pirate-movie tropes” from protectable  
 3 expression. *Alfred v. Walt Disney Co.*, 821 F. App’x 727, 729 (9th Cir. 2020).

4 On remand, WDP indicated that it intended to renew on summary judgment  
 5 its argument that the works are not substantially similar as a matter of law. Fact  
 6 discovery was not needed to tee up WDP’s new motion on substantial similarity,  
 7 because that motion entailed only an objective comparison of the similarities  
 8 between the two works, which were already before the Court and the contents of  
 9 which were undisputed. The only thing that needed to be added to the record before  
 10 WDP could file its summary judgment motion on substantial similarity was the  
 11 expert testimony that the Ninth Circuit had suggested could help inform the Court’s  
 12 analysis of substantial similarity. Accordingly, WDP proposed that discovery be  
 13 bifurcated to facilitate the efficient resolution of WDP’s summary judgment motion  
 14 without burdensome and costly fact discovery. *See* Segall Decl. ¶¶ 4–5. In phase 1,  
 15 the parties would be limited to expert discovery on substantial similarity; and then,  
 16 in phase 2—if the case survived WDP’s summary judgment motion—discovery  
 17 would open on all issues. *Id.*

18 The text of the stipulation confirms that this was the parties’ agreement, and  
 19 belies Plaintiffs’ argument that the stipulation was intended to *prohibit* fact  
 20 discovery on substantial similarity in phase 2. *See* Segall Decl. Ex. 3 [Dkt. 121].  
 21 The stipulation provided that discovery would be bifurcated, with “[d]iscovery in  
 22 the first phase limited to the issue of substantial similarity.” *Id.* ¶ 10(a). The  
 23 stipulation went on to clarify that phase 1 discovery would be limited to *expert*  
 24 discovery on substantial similarity:

25 *More specifically*, in the first discovery phase discovery shall be  
 26 limited to: (i) initial disclosures under Federal Rule of Civil Procedure  
 27 26(a)(1), which shall be made by January 29, 2021; expert disclosures  
 28 under Federal Rule of Civil Procedure 26(a)(2) relating to the issue of  
 substantial similarity, which shall be made by March 30, 2021; and (iii)  
 one deposition of each side’s respective expert witnesses on substantial  
 similarity.

1 *See id.* ¶ 10(b) (emphasis added). In other words, *all* non-expert discovery (on *any*  
 2 issue) was prohibited in phase 1—including document requests, fact depositions,  
 3 and written discovery. The parties further stipulated that phase 2 of discovery  
 4 would only commence if the case did not settle and the Court denied WDP’s motion  
 5 for summary judgment on substantial similarity. In that circumstance, the  
 6 stipulation provided that phase 2 discovery “shall commence **on all issues with no**  
 7 **limitations other than as provided herein or by law.**” *Id.* ¶ 15.

8 On January 19, 2020, the Court issued an order bifurcating discovery pursuant  
 9 to the parties’ stipulation. *See* Segall Decl. Ex. 4 [Dkt. 122]. The Court’s  
 10 bifurcation order provided that, while discovery in phase 1 would be limited to  
 11 initial disclosures and *expert* discovery on substantial similarity, discovery in phase  
 12 2 would “encompass all issues”:

13           Discovery in the second phase shall commence following the  
 14 Court’s rulings on Walt Disney Pictures’ motion for summary judgment,  
 15 or immediately after mediation if Walt Disney Pictures elects not to file  
 16 a motion for summary judgment. **The second phase of discovery shall encompass all issues**, without limitation other than as provided herein or by law.

17 *Id.* ¶ 7 (emphasis added). Notably, nothing in the order purported to limit the  
 18 subject matter of discovery in phase 2.

19 The stipulation and the Court’s bifurcation order refute Plaintiffs’ objection  
 20 that the second phase of discovery is limited to “‘other discovery’ *not relating to*  
 21 *substantial similarity.*” *See* Segall Decl. Ex. 2 [Interrogatory Responses] at 7. The  
 22 order provides that phase 2 of discovery encompasses “all issues, without limitation  
 23 other than as provided herein or by law.” *Id.* Ex. 4 [Dkt. 122]. Neither anything in  
 24 the order, nor any legal provision, prohibits fact discovery on substantial similarity.  
 25 Indeed, they provide that such discovery is fair game now.

26 Plaintiffs’ argument amounts to the illogical proposition that the parties  
 27 agreed, *sub silentio*, to prohibit non-expert discovery on substantial similarity  
 28 altogether. As noted, the Court’s bifurcation order limited discovery in phase 1 to

1 expert discovery. *See id.* ¶ 5 (providing that phase 1 discovery “shall be limited to”  
 2 Rule 26(a)(1) initial disclosures, expert disclosures and reports, and “one deposition  
 3 of each side’s respective expert witnesses on substantial similarity”). Plaintiffs’  
 4 objection may have had some purchase if WDP had an opportunity to serve  
 5 interrogatories regarding Plaintiffs’ substantial similarity contentions in phase 1 but  
 6 elected not to. Instead, WDP *could not* have served the interrogatories at issue in  
 7 phase 1, because only *expert* discovery was allowed in that phase. In other words, if  
 8 Plaintiffs were correct that the Court intended to prohibit discovery on substantial  
 9 similarity in phase 2, the bifurcation stipulation would have the effect of prohibiting  
 10 fact discovery on substantial similarity altogether—resulting in the parties mutually  
 11 forfeiting the right to discover documents, serve written discovery, or ask deposition  
 12 questions regarding the alleged similarities between the works.<sup>6</sup> The parties would  
 13 never agree to such an arrangement, and the record clearly reflects they did not do  
 14 so.

15 Plaintiffs’ construction of the parties’ stipulation appears to be a contrivance  
 16 to give them an escape hatch for discovery they prefer (understandably) not to  
 17 answer. In meet and confer, Plaintiffs contended that “[t]he purpose of the  
 18 stipulation was that substantial similarity would be *resolved* in Phase 1.” Segall  
 19 Decl. Ex. 13 [3/11 Arenz Email] (emphasis added). But that is wrong. The purpose  
 20 of the discovery stipulation was to “[l]imit[] initial discovery to facilitate the  
 21 efficient resolution of whether substantial similarity exists” between the works *as a*  
 22 *matter of law* by permitting the parties to introduce the expert testimony that the  
 23 Ninth Circuit had stated would help inform that question. *Id.* Ex. 3 [Dkt. 121] ¶ (b).  
 24 Ultimately, the Court denied WDP’s summary judgment motion, holding that  
 25

26 <sup>6</sup> Plaintiffs have noticed the depositions of several of the screenwriters, producers,  
 27 and executives on *Curse*, and will most surely ask about purported similarities  
 28 between *Curse* and the Screenplay. Any such questioning would be wholly  
 inconsistent with Plaintiffs’ refusal to answer the four interrogatories at issue.

1 disputes of facts precluded the issue from being decided as a matter of law on a pre-  
 2 trial motion. The Court's summary judgment order did not "resolve" the issue of  
 3 substantial similarity, as Plaintiffs put it; rather, it held that "the parties' expert  
 4 opinions create a genuine issue of disputed fact regarding whether the works are  
 5 substantially similar" that will have to be resolved by the jury at trial. *Id.* Ex. 9  
 6 [Dkt. 200] at 7. Substantial similarity remains a live issue at trial, and with fact  
 7 discovery now open on "all issues," *id.* Ex. 4 [Dkt. 122] ¶ 7, WDP is entitled to use  
 8 interrogatories to discover Plaintiffs' contentions regarding the purported  
 9 similarities between the works.

10 **C. Even If Plaintiffs' Objections Were Meritorious, They Would Be**  
 11 **Beside The Point, Because WDP's Interrogatories Are Highly**  
**Relevant To Issues Other Than Substantial Similarity**

12 Even if Plaintiffs were correct that the Court's bifurcation order could be  
 13 interpreted to prohibit all fact discovery on substantial similarity, Plaintiffs would  
 14 still be obligated to answer WDP's contention interrogatories because they are  
 15 relevant to matters that are concededly the proper subject of discovery in phase 2,  
 16 including (1) whether the elements that Plaintiffs allege were infringed actually  
 17 derive from the Disney theme park ride that Plaintiffs' Screenplay adapted; and (2)  
 18 whether WDP or third-party screenwriters independently created the elements that  
 19 Plaintiffs claim were infringed.

20 First, WDP sought summary judgment on the ground that Plaintiffs'  
 21 Screenplay is an unauthorized derivative work of Disney's Pirates of the Caribbean  
 22 theme park ride, and the Court agreed with Plaintiffs that that issue was *not* covered  
 23 by the parties' stipulation:

24 [T]he Court finds the issue of whether Plaintiffs' Screenplay is a  
 25 derivative work of Disney's Ride is outside the scope of the parties'  
 26 stipulation because it would require the Court to examine whether  
 27 Plaintiffs' Screenplay is based on Disney's Ride and whether Disney's  
 28 Ride is copyrightable, rather than compare whether Plaintiffs'  
 Screenplay is substantially similar to Defendant's Film.



1 Segall Decl. Ex. 9 [Dkt. 200] at 8. Accordingly, whether the Screenplay elements  
2 Plaintiffs claim were infringed were derived from the much earlier theme park ride  
3 was not part of discovery phase 1. WDP has a right to know which elements  
4 Plaintiffs claim were infringed, so it can develop evidence that these elements were  
5 actually taken from Disney's own ride. For example, if Plaintiffs contend that  
6 *Curse* infringes their Screenplay's Caribbean setting or depiction of skeleton-faced  
7 pirates (as in fact Plaintiffs have), WDP can show the jury that these elements  
8 already existed in the ride that serves as the source material for both parties' works  
9 and therefore cannot serve as the basis for a copyright claim. But WDP cannot  
10 identify which of the alleged similarities between the works have a common source  
11 in the ride until Plaintiffs answer the contention interrogatories at issue.

12 Second, the contention interrogatories are relevant to WDP's independent  
13 creation defense, which is clearly not covered by the stipulation. WDP will seek to  
14 prove at trial that the alleged similarities between the Screenplay and *Curse* were in  
15 fact independently created by WDP and/or third-party screenwriters, either because  
16 they appeared in written treatments before Plaintiffs submitted their Screenplay or  
17 because they were conceived by screenwriters who never had access to Plaintiffs'  
18 Screenplay.

19 WDP's substantial similarity defense depends on WDP knowing which  
20 elements of the Screenplay Plaintiffs claim were infringed, so it can develop  
21 relevant proof of independent creation. For example, if Plaintiffs contend they (and  
22 only they) came up with the idea of using supernatural elements, WDP needs to  
23 know precisely what they are claiming *Curse* infringed so they can determine which  
24 of the writers introduced that element to the *Curse* script. WDP is already  
25 prejudiced by Plaintiffs' failure to answer these interrogatories in advance of the  
26 depositions of executives and writers for the *Curse* film. While Plaintiffs may know  
27 which elements they intended to claim were infringed; WDP does not and therefore  
28 cannot ask the witnesses about their independent conception, development, and



1 creation of such elements during the depositions. If these witnesses become  
 2 unavailable for trial, WDP will not have had a fair opportunity to develop that  
 3 testimony.

#### 4 **V. PLAINTIFF SCREENWRITERS' CONTENTIONS AND POINTS AND** 5 **AUTHORITIES**

6 The Plaintiffs Screenwriters have pursued their claim that Disney copied their  
 7 *Pirates* screenplay since 2017. Disney has aggressively defended this case at every  
 8 stage since. Disney first moved to dismiss the Screenwriters' complaint on the issue  
 9 of substantial similarity. After the district court granted that motion, the  
 10 Screenwriters appealed.

11 The Ninth Circuit reversed. The Ninth Circuit held that the district court erred  
 12 by "failing to compare the original selection and arrangement of the unprotectible  
 13 elements between the two works." *Alfred v. Disney*, 821 F. App'x 727, 729 (9th Cir.  
 14 2020). And based on its own review, the Ninth Circuit found that "the selection and  
 15 arrangement of the similarities between [the two works] is more than de minimis."  
 16 *Id.* The court also invited expert testimony about whether these similarities were  
 17 "qualitatively significant." *Id.* Disney then petitioned for en banc review of this  
 18 memorandum disposition, which the Ninth Circuit denied. Hilvert Decl. ¶ 3.

19 On remand, Disney wanted to bifurcate discovery. Hilvert Decl. ¶4. Disney  
 20 sought to expedite its motion for summary judgment on substantial similarity as  
 21 soon as possible. The parties negotiated a stipulation to bifurcate discovery by issue  
 22 as a result. Phase 1 would address substantial similarity with limited discovery. *Id.*  
 23 Phase 2 would address all other issues. *Id.* Indeed, in Disney's counsel's own words,  
 24 "the purpose of bifurcating discovery is so that substantial similarity can be *resolved*  
 25 before proceeding to discovery *other* issues." *Id.* at ¶8, Ex. D (emphasis added). The  
 26 parties filed their stipulation and the Court bifurcated discovery into phases as a  
 27 result. Segall Decl. Ex. 3 at ¶10, Ex. 4 at ¶4.  
 28

1       The parties stipulated that they needed little fact discovery for Phase 1. While  
 2 Disney originally envisioned several fact depositions and document requests (*id.* Ex  
 3 B at pg. 3), the parties’ thereafter agreed to streamline Phase 1 even further to focus  
 4 on expert discovery. *Id.* Ex. E at pg. 3. This stipulation was designed at Disney’s  
 5 interest in expediting its summary judgment motion as soon as possible. To that end,  
 6 the Screenwriters’ served an expert report from a tenured professor at the  
 7 University of Southern California. Segall Decl. Ex. 7. He opined about the  
 8 qualitative significance of the elements that the Ninth Circuit found similar between  
 9 the two works. *Id.* Professor Román also detailed his opinion on each of the eight  
 10 factors that make up the extrinsic test. *Id.* Disney served a rebuttal report who  
 11 disagreed with Professor Román and concluded that the elements in the screenplay  
 12 were not novel. Hilvert Decl. Ex. ¶13 Ex. F. Professor Román then served a rebuttal  
 13 to Disney’s report. Hilvert Decl. ¶14. Ex. G. And the parties deposed the experts  
 14 over four days and 800 pages of testimony. Hilvert Decl. ¶15-16.

15       Disney then moved for summary judgment last fall. Yet Disney backtracked  
 16 on the plain language of the stipulation—for the first time—in its motion for  
 17 summary judgment. In the stipulation, the parties agreed that “Walt Disney Pictures  
 18 may file a motion for summary judgment on *only* the issue of substantial similarity”  
 19 in Phase 1. Segall Decl. Ex. 3 at ¶14 (emphasis added). Even so, Disney’s motion  
 20 for summary judgment was not so limited. Disney argued that the screenplay was an  
 21 unauthorized derivative work—Disney’s thirteenth affirmative defense—aside from  
 22 its argument that works were not substantially similar.

23       Judge Marshall rejected both arguments from Disney. On substantial  
 24 similarity, the Court applied routine summary judgment principles to deny the  
 25 parties’ clear fact dispute. Segall Decl. Ex. 9 at pg. 7 (“the parties’ expert opinions  
 26 create a genuine issue of disputed fact regarding whether the works are substantially  
 27 similar, [so] the Court denies Defendant’s Motion for Summary Judgment on the  
 28 issue of substantial similarity.”). Judge Marshall also rejected Disney’s efforts to

1 renege on the parties' clear stipulation. *Id.* at pg. 8 ("the Court finds the issue of  
 2 whether Plaintiffs' Screenplay is a derivative work of Disney's Ride is outside the  
 3 scope of the parties' stipulation"). Thus, the Court denied Disney's motion for  
 4 summary judgment and the case went on to Phase 2.

5 Unsatisfied and undeterred, Disney moved to certify Judge Marshall's order  
 6 on summary judgment to the Ninth Circuit. Hilvert Decl. ¶17. Judge Marshall  
 7 denied this motion in early March. Hilvert Decl. ¶18, Ex. H. As a result, the parties  
 8 need only complete discovery in Phase 2, on topics like damages and Disney's  
 9 affirmative defenses, before the parties may finally resolve this case on the merits at  
 10 trial in February 2023. Yet as this motion shows, Disney is not done with its  
 11 scorched-earth effort to relitigate substantial similarity.

12  
 13 **A. The Court should deny Disney's motion to compel because**  
 14 **discovery on substantial similarity falls outside the parties'**  
**stipulation to bifurcate discovery into two phases.**

15 Disney's contention interrogatories about substantial similarity are improper  
 16 for Phase 2. The essential quid-pro-quo for Disney's proposed bifurcation was to  
 17 streamline discovery about substantial similarity, so Disney could proceed with an  
 18 early motion for summary judgment on that issue. Disney enjoyed that benefit and  
 19 lost its motion. The Court should deny Disney's effort to relitigate that same issue  
 20 again now. Indeed, the plain language of the stipulation, the parties' intent for the  
 21 stipulation, and common sense dictates that Phase 2 discovery is about all issues  
 22 *other* than substantial similarity.

23 Disney's efforts to backtrack on its agreement to bifurcate fact discovery  
 24 eliminates the efficiencies the stipulation was meant to provide. The stipulation—  
 25 and corresponding order—reflects the unambiguous conclusion that fact discovery  
 26 was bifurcated into two phases:

27 **Fact discovery shall be bifurcated**, with discovery in the first phase  
 28 limited to the issue of substantial similarity; if **other** discovery is

1 necessary, it will occur in a second phase that will follow the parties'  
 2 mediation and the Court's resolution of Walt Disney Pictures' intended  
 3 motion for summary judgment on substantial similarity, as set forth  
 4 below.

5 Segall Decl. Ex. 3 at ¶10 (emphasis added); *see also* Ex. 4 at ¶4. Put differently, the  
 6 first phase of "fact discovery" was limited to substantial similarity. *Id.* The second  
 7 phase of "fact discovery" addressed all "*other* discovery." *Id.* (emphasis added).  
 8 Nothing about this plain language supports Disney's conclusion now that Phase 1  
 9 was limited to fact discovery on substantial similarity, and Phase 2 encompasses all  
 10 discovery with no limits.

11 Nor does the intent of the parties support Disney's interpretation now.  
 12 Perhaps most glaring is how inconsistent Disney with what it states to this Court  
 13 versus how it induced the stipulation originally. Here is what Disney stated to the  
 14 Court:

- 15 • "In meet and confer, Plaintiffs contended that '[t]he purpose of the  
 16 stipulation was that substantial similarity would be *resolved* in Phase 1.'  
 Segall Decl. Ex. 13 [3/11 Arenz Email] (emphasis added). But that is  
 wrong." Disney Points and Contentions, § IV.B.

17 Yet Disney said the exact opposite when it negotiated the stipulation for its benefit:

- 18 • "As we agreed during the call, the purpose of bifurcating discovery is  
 19 so that substantial similarity can be *resolved* before proceeding to  
 20 discovery [on] *other* issues." Hilvert Decl. ¶8 Ex. D (emphasis added).

21 The Court should deny Disney's motion based on these contradictory  
 22 representations alone.

23 Yet there is more. Early drafts of the stipulation contemplated some fact  
 24 deposition beyond what the parties ultimately agreed to. *See, e.g.*, Hilvert Decl. ¶6,  
 25 Ex. B ("(b) In the first discovery phase, the parties shall be limited to three (3) fact  
 26 depositions each and twenty (20) requests for production of documents."). That the  
 27 parties narrowed the stipulation further without other material changes to the  
 28 bifurcation of discovery underscores that the parties knowingly limited the scope of

1 “fact discovery” on the issue of substantial similarity. Indeed, that was a core  
2 element of the stipulation: Disney would get the benefit an early summary judgment  
3 motion (and the ability to move for summary judgment again on other issues if the  
4 first motion failed) in exchange for streamlined and limited fact discovery. Hilvert  
5 Decl. ¶10. Counsel for the Screenwriters would not have agreed to the stipulation if  
6 Disney could prolong the trial date through bifurcated discovery while also  
7 preserving the ability to pursue unbridled discovery on substantial similarity even  
8 after Judge Marshall denied summary judgment on that issue. Hilvert Decl. ¶10.

9 Disney’s hindsight interpretation also ignores other key limiting language.  
10 Like a contract, the Court should not render language surplusage. *United States v.*  
11 *Hathaway*, 242 F.2d 897, 900 (9th Cir.1959) (“a court must give effect to every  
12 word or term employed by the parties and reject none as meaningless or surplusage  
13 in arriving at the intention of the contracting parties”). Both the stipulation and order  
14 state: “The second phase of discovery shall encompass all issues, without limitation  
15 **other than as provided herein** or by law.” Segall Decl. Ex. 4 at ¶7 (emphasis  
16 added); *see also* Ex. 3 at ¶15. If Phase 2 fact discovery is unlimited as Disney now  
17 contends, then this “other than as provided herein” provision is meaningless. And  
18 the conclusion that Phase 2 fact discovery would not cover substantial similarity  
19 follows common sense as well: why would parties bifurcate fact discovery on an  
20 issue before a motion for summary judgment if that same issue would be subject of  
21 fact discovery *after* the Court found a genuine dispute of material fact on that issue?

22 Finally, Disney’s arguments about the need for this discovery ignores the  
23 record. If Disney needed the discovery it now contends it so badly needs, then it  
24 would have sought it before the hundreds of pages of expert reports and depositions  
25 and its motion for summary judgment on that exact issue. Yet Disney’s expert had  
26 no issue responding to Professor Román and expressing his opinions on substantial  
27 similarity. And Disney likewise had no issue vigorously arguing that the Court  
28

1 should grant summary judgment. That Disney forewent contention interrogatories in  
2 Phase 1 only confirms that it does not need them now in Phase 2.

3 **B. Disney’s four overlapping and burdensome contention**  
4 **interrogatories address the subject of substantial similarity, not**  
5 **Disney’s affirmative defenses.**

6 Disney is incorrect that these interrogatories are somehow directed at  
7 affirmative defenses. Interrogatory 4 and 6 both ask for detailed contentions about  
8 elements that are “infringed.” Interrogatory 8 is about elements that Disney  
9 “copied.” And Interrogatory 5 is about “original expression,” and courts use  
10 “original” and “protectible” interchangeably in copyright law. *See, e.g., Swirsky v.*  
11 *Carey*, 376 F.3d 841, 844 (9th Cir. 2004). The entire basis for Disney’s motion to  
12 dismiss and summary judgment was that the similarities between the two works  
13 were not protectible. These four interrogatories on their face go to the  
14 Screenwriters’ prima facie case on substantial similarity. None of these  
15 interrogatories addresses the elements of any affirmative defense.

16 Even so, the Court should not compel *four* overlapping and duplicative  
17 interrogatories under any scenario. All discovery is subject to the rule of  
18 proportionality. *See, e.g., Hernandez v. Barr*, 2019 WL 13019923, at \*5 (C.D. Cal.  
19 Mar. 25, 2019) (“[t]he 2015 amendments to Rule 26(b)(1) emphasize the need to  
20 impose reasonable limits on discovery through increased reliance on the common-  
21 sense concept of proportionality”) (internal citation omitted). Disney’s four  
22 duplicative interrogatories fail this “common-sense concept of proportionality” in  
23 spades on this record. To start, the Court has already found a triable issue based on  
24 an extensive record. More discovery on this subject only serves to multiply the  
25 burden of the extensive pretrial record here.

26 Disney also fails to address each interrogatory individually. This omnibus  
27 approach is by itself is wrong. “[W]hen the dispute concerns individual objections,  
28 such a vagueness, overbreadth, or privilege, relating to individual discovery  
requests, and the specific language of the request and the response matter, the Joint



1 Stipulation’s presentation prevents the Court from efficiently and effectively  
 2 considering the parties’ respective positions’ to the extent it uses ‘an ‘omnibus’  
 3 ‘legal argument’ relating to all disputed discovery requests, rather than following  
 4 each request at issue.” *See Williams v. J.B. Hunt Transport, Inc.*, 2021 WL 3265337,  
 5 at \*8 (C.D. Cal. May 19, 2021)). Indeed, Disney offers no showing as to why it  
 6 needs four separate “all facts” contention interrogatories on the same subject. And  
 7 “all facts” contention interrogatories are overbroad and burdensome. *See Heredia v.*  
 8 *Sunrise Senior Living LLC*, 2020 WL 12584277, at \*5 (C.D. Cal. July 20, 2020)  
 9 (collecting cases).

10 Even if Disney’s interrogatories fell within the scope of Phase 2 discovery,  
 11 Disney’s motion also conflicts with established law and its own position on  
 12 contention interrogatories. “Indeed, it is generally accepted that courts ‘[will] not  
 13 order responses to contention interrogatories until late in the pretrial period’ and that  
 14 ‘the wisest general policy is to defer propounding and answering contention  
 15 interrogatories until near the end of the discovery period.’” *Open Text Inc. v.*  
 16 *Northwell Health, Inc.*, 2020 WL 6050595, at \*4 (C.D. Cal. Aug. 6, 2020) (quoting  
 17 *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 333 (N.D. Cal. 1985)); *see also*  
 18 Fed. R. Civ. P. 33(a)(2), 1970 Advisory Committee Notes (“[T]he court is expressly  
 19 authorized to defer an answer.”). And Disney took this exact position to refuse to  
 20 answer interrogatories served by the Screenwriters. For instance, Disney objected to  
 21 the Screenwriters’ interrogatory about damages: “To the extent this Interrogatory  
 22 asks WDP to state its position regarding the amount of any profits that should be  
 23 apportioned to allegedly infringing or non-infringing aspects of the Film, then WDP  
 24 objects that this Interrogatory calls for a legal conclusion, is premature, and the  
 25 subject of expert testimony.” *See, e.g.*, Hilvert Decl. Ex. I at 24:1-5. That Disney  
 26 refuses to provide its “position” on damages-related information—a proper subject  
 27 for Phase 2—refutes Disney’s demand that the Screenwriters answer its contention  
 28 interrogatories now. Disney’s requested relief is just make-work while the parties



1 undertake the discovery that was postponed for Phase 2. The Court should deny  
2 Disney's motion.

### 3 **VI. PROPOSED RESOLUTIONS DURING THE CONFERENCE OF** 4 **COUNSEL**

#### 5 **A. WDP's Proposed Resolution**

6 WDP initially addressed these contention interrogatories in a letter on  
7 February 28, 2022. *See* Segall Decl. ¶ 16 & Ex. 11. WDP's letter requested that  
8 Plaintiffs provide complete responses to Interrogatories 4, 5, 6, and 8. At the  
9 conference of counsel on March 9, 2022, WDP reiterated that request and explained  
10 that this should not be difficult given that Plaintiffs had set forth lists of similarities  
11 in numerous places over time, and that WDP's request for was for Plaintiffs to  
12 commit to a single, comprehensive list of similarities in a verified written discovery  
13 response so the parties could narrow the issues for trial. *Id.* ¶ 17. Plaintiffs  
14 responded that they believed they had no obligation to answer the interrogatories.  
15 *Id.* Finally, WDP sent a second meet-and-confer letter on March 11, 2022,  
16 reiterating its request for full and complete responses to these four interrogatories.  
17 *Id.* ¶ 18 & Ex. 12. By email dated March 11, 2022, Plaintiffs' counsel stated that  
18 Plaintiffs "will stand on our objection that the current phase of discovery excludes  
19 the issue of substantial similarity." *Id.* ¶ 19 & Ex. 13.

#### 20 **B. Plaintiff Screenwriters' Proposed Resolution**

21 Disney's position at the conference of counsel was a take-it-or-leave it  
22 position. It offered no compromise. Given the plain text of the parties' stipulation,  
23 fact discovery in this phase two does not address substantial similarity. Because  
24 Disney's discovery addresses substantial similarity, Disney's requests are improper  
25 and will lead to additional pre-trial litigation and motion practice that the bifurcation  
26 stipulation and order was designed to prevent.

1 DATED: March 29, 2022

ROBINS KAPLAN LLP

2 By: /s/ Patrick M. Arenz  
3 *Attorneys for Plaintiffs Arthur Lee Alfred II*  
4 *and Ezequiel Martinez, Jr.*

5 DATED: March 29, 2022

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